

1 Law Office of Debra R. Torres-Reyes  
Debra R. Torres-Reyes  
2 State Bar No. 146724  
1901 First Ave., Ste. 158  
3 San Diego, Ca 92101  
(619) 237-7891  
4 (619) 237-1156 Fax  
dtr4justice@aol.com  
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6 UNITED STATES DISTRICT COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
8 (HONORABLE IRMA E. GONZALEZ)

9 UNITED STATES OF AMERICA )	CASE NO. 07CR-3279-IEG
10 Plaintiff, )	
11 v. )	DATE: JANUARY 14, 2008
12 IVAN FLORES, )	TIME: 2:00 P.M.
13 Defendant. )	CTRM:
14 )	MEMORANDUM OF POINTS AND
15 )	AUTHORITIES IN SUPPORT OF
	DEFENDANT'S MOTIONS FOR:
	(1) DISCOVERY; AND
	(2) LEAVE TO FILE
	ADDITIONAL MOTIONS

16  
17 **COMES NOW** defendant, IVAN FLORES, by and through  
18 his attorney, Debra R. Torres-Reyes, and submits the  
19 following Memorandum of Points and Authorities, and  
argument in support of his motions.

20 **I.**

21 **MOTION TO COMPEL DISCOVERY**

22 To preserve his rights and guard against undue  
23 prejudice due to delay, defendant seeks an order  
24 compelling discovery of the following material, and  
further seeks an order establishing a discovery  
25 schedule in this case. Defendant requests full  
26 discovery pursuant to Rule 16 of the Federal Rules of  
27 Criminal Procedure, *Brady v. Maryland*, 373 U.S.

1 83(1963), the Jenks Act (18 U.S.C. § 3500), and the  
2 Fifth and Sixth Amendments of the United States  
3 Constitution. For the purposes of Rule 16 discovery and  
4 Brady the prosecutor "will be deemed to have knowledge  
5 of and access to anything in the possession, custody or  
6 control of any federal agency participating in the same  
7 investigation of defendant." *United States v. Bryan*,  
8 868 F.2d 1032, 1036 (9<sup>th</sup> Cir. 1989). Defendant requests  
9 that discovery be completed reasonably in advance of  
10 trial so that he can make use of the materials provided  
11 in his defense.

12 This court has the authority to provide discovery  
13 by a certain date and bar the use of any evidence not  
14 disclosed after that date. This authority is expressly  
15 conferred under Rule 16(d)(2) and has been upheld in a  
16 number of cases. See, e.g. *Taylor v. Illinois*, 484  
17 U.S. 400 (1988) (exclusion of surprise defense witness  
18 for discovery violation does not violate defendants  
19 rights); *United States v. Aceves-Rosales*, 832 F.2d 1155  
20 (9<sup>th</sup> Cir. 1987) (not abuse of discretion to bar defense  
21 use of evidence discovered and subpoenaed the day  
22 before trial but not disclosed until after the  
23 government had rested in violation of Rule 16); *United*  
24 *States v. Burgess*, 791 F.2d 676 (9<sup>th</sup> Cir. 1986) (government  
25 barred from making any use, including use for  
26 impeachment, of non-disclosed inculpatory statement  
27 made to DEA agent). The Court's authority to enforce  
28 such orders against the government by excluding  
evidence is beyond dispute. *United States v. Roybal*,  
566 F.2d 1109, 1110-11 (9<sup>th</sup> Cir. 1977); see also *United*  
*States v. Gatto*, 763 F.2d 1040, 1046-47 (9<sup>th</sup> Cir.

1 1985); United States v. Schwartz, 857 F.2d 655, (9<sup>th</sup> Cir.  
2 1988).

3 A discovery schedule is authorized by Rule 16(d) (2)  
4 and will serve to avoid delay, conserve scarce judicial  
5 resources, prevent surprise, and further the search for  
6 the truth at trial. This Court should therefore impose  
7 discovery schedule and bar the introduction of evidence  
8 not disclosed by that date. Defendant seeks discovery  
9 of the following.

10 (1) Statements of The Defendant

11 Pursuant to Rule 16(a) (1) (A), defendant requests  
12 full discovery concerning any statements made by him.  
13 The rule requires disclosure of any statement of the  
14 defendant's in the possession of the government in any  
15 form. It also requires disclosure of any portion of  
16 any report or other written record containing the  
17 substance of a statement by the defendant made to a  
18 known government agent, and the substance of any other  
19 statement made by the defendant to a known government  
20 agent which the government intends to use at trial for  
21 any purpose.

22 The government must disclose not only the substance  
23 of the defendant's statement but also the substance of  
24 the defendant's statements. If there is a recording,  
25 the defense requests it forthwith.

26 (2) Arrest Reports and Notes. The defendant also  
27 specifically requests the government to turn over all  
28 arrest reports, notes and TECS records, dispatch tapes  
and police records, and California State police office  
reports (if an officer was involved), relating to the  
circumstances surrounding his arrest or any

1 questioning. This request includes to the circumstances  
2 surrounding his arrest or any questioning. This request  
3 includes, but is not limited to, any rough notes,  
4 records, reports, transcripts or other documents in  
5 which statements of the defendant or any other  
6 discoverable material is contained. Such material is  
7 discoverable under Fed.R.Crim. P.16(a)(1)(A) and Brady  
8 v. Maryland, 373 U.S. 83 (1963). The government must  
9 produce arrest reports, investigators' notes, memos  
10 from arresting officers, sworn statements, and  
11 prosecution reports pertaining to the defendant. See  
12 Fed.R.Crim.P. 16(a)(1)(B) and (C), 26.2 12(1); United  
13 States v. Harris, 543 F.2d 1247, 1253. (9<sup>th</sup> Cir. 1976)  
14 (original notes with suspect or witness must be  
15 preserved); see also United States v. Anderson, 813  
16 F.2d 1450, 1458 (9<sup>th</sup> Cir. 1987) (reaffirming *Harris*'  
17 holding).

18 (3) Brady Material. The defendant requests all  
19 documents, statements, agents' reports, and tangible  
20 evidence favorable to the defendant on the issue of  
21 guilt and /or which affects the credibility of the  
22 government's case. *Kyles v. Whitley*, 514 U.S. 419  
23 (1995). Under *Brady*, *Kyles* and progeny, impeachment as  
24 well as exculpatory evidence falls within the  
25 definition of evidence favorable to the accused. See  
26 also United States v. Bagley, 473 U.S. 667 (1985);  
27 United States v. Agurs, 427 U.S. (1976). All  
28 information, including notes, memos, the substance of  
conversations (even if not yet memorialized) should be  
disclosed. This includes any information that may  
result in a lower sentence under the Guidelines.

1       (4) The Defendant's Prior Record. The defendant  
2 requests disclosure of his prior record. Fed.R.Crim.P.  
3 16(a)(1)(B), including both convictions and arrests, if  
4 applicable.

5       (5) Any Proposed 404(b) Evidence. The government  
6 must produce evidence of prior similar acts under  
7 Fed.R.Crim.P. 16(a)(1)(c) and Fed.R.Evid. 404(b) and  
8 609. In addition, "upon request of the accused, the  
9 prosecution. . .shall provide reasonable notice in  
10 advance of trial . . . of the general nature" of any  
11 evidence the government proposes to introduce under  
12 Fed. R. Evid. 404 (b) at trial in both case-in-chief  
13 but also to evidence which the government may use as  
14 rebuttal. See United States v. Vega, 188 F.3d 1150 (9<sup>th</sup>  
15 Cir. 1999). The defendant is entitled to "reasonable  
16 notice" so as to "reduce surprise," preclude "trial by  
17 ambush" and prevent the "possibility of prejudice." *Id*;  
18 United States v. Perez-Tosta, 36 F.3d 1552, 1560-61  
19 (11<sup>th</sup> Cir. 1994), and he requests such notice at least  
20 two weeks before trial in order to give the defense  
21 time to adequately investigate and prepare for trial.

22       (6) Evidence Seized. The defendant requests  
23 production of evidence seized as a result of any  
24 search, Fed.R.Crim.P. 16(a)(1)(C).

25       (7) Request for Preservation of Evidence. The  
26 defendant specifically requests the preservation of any  
27 and all physical evidence that may be destroyed, lost,  
28 or otherwise put out off the possession, custody, or  
care of the government and which relates to the arrest  
or the events leading to the arrest in this case.

      (8) Expert Witnesses. The defendant requests the

1 name, qualifications, and a written summary of the  
2 testimony of any person that the government intends to  
3 call as an expert witness during its case in chief.  
4 Fed.R.Crim.P. 16(a)(1)(E).

5 The defense requests the notice of expert testimony  
6 be provided at a minimum of two weeks prior to trial so  
7 that the defense can properly prepare to address and  
8 respond to this testimony, including obtaining its own  
9 expert and/or investigating the opinions and  
10 credentials of the government's expert. The defense  
11 also requests a hearing in advance of trial to  
12 determine the admissibility of qualifications of any  
13 expert. See Kumho Tire Co. v. Carmichael, 526 U.S. 137  
14 (1999) (trial judge is "gatekeeper" and must determine,  
15 reliability and relevancy of expert testimony and such  
16 determinations may require "special briefing or other  
17 proceedings").

18 (9) Evidence of Bias or Motive to Lie. The  
19 defendant requests any evidence that any prospective  
20 government witness is biased or prejudiced against the  
21 defendant, or has a motive to falsify or distort his or  
22 her testimony; this request encompasses all impeachment  
23 evidence, including internal investigations,  
24 disciplinary actions, suspected or confirmed criminal  
25 activity and conflicting statements made by government  
26 witnesses.

27 (10) Giglio Information. Pursuant to Giglio v.  
28 United States, 405 U.S. 150 (1972), the defendant  
requests all statements and/or promises, express or  
implied, made to any government witnesses, in exchange  
for their testimony in this case, and all other

1 information which could arguably be used for the  
2 impeachment of any government witnesses.

3 (11) Jencks Act Material. The defendant requests  
4 production in advance of trial of all material,  
5 including dispatch tapes and radio communications,  
6 which the government must produce pursuant to the  
7 Jencks Act, 18 U.S.C. § 3500; Fed.R.Crim.P. 26.2.  
8 Advance production will avoid the possibility of delay  
9 at the requests of defendant to investigate the Jencks  
10 material. A verbal acknowledgment that "rough" notes  
11 constitute an accurate account of the witness'  
12 interview is sufficient for the report or notes to  
13 qualify as a statement under section 3500(e)(1).  
14 Campbell v. United States, 373 U.S. 487, 490-92 (1963);  
15 see also United States v. Boshell, 952 F.2d 1101 (9<sup>th</sup>  
16 Cir. 1991) (holding that where an agent goes over  
17 interview notes with subject, interview notes are  
18 subject to Jencks Act).

19 (12) Residual Request. Defendant invokes his right  
20 to discovery to the fullest extent possible under the  
21 Federal Rules of Criminal Procedure and the  
22 Constitution and laws of the United States.

## 23 II.

### 24 DEFENDANT SHOULD BE GRANTED

### 25 LEAVE TO FILE ADDITIONAL MOTIONS

26 As of the filing of this motion, the Defense has  
27 received some discovery from the government. Therefore  
28 the production of any additional discovery may  
demonstrate the need for filing other motions.

Accordingly, due to the unavailability of such  
discovery, it is requested that the defendant be given

1 an opportunity to file appropriate motions at a later  
2 date.

3 Furthermore, defendant respectfully requests the  
4 right to file in limine motions relating to evidentiary  
5 matters as well as other pretrial motions which become  
6 necessary in light of production of additional motions.

7 **III.**

8 **CONCLUSION**

9 For all of the foregoing reasons, Ivan Flores, by  
10 and through his attorney, Debra R. Torres-Reyes,  
11 respectfully requests that the above-entitled motions  
12 be granted.

13 Dated: January 7, 2008

Respectfully submitted,  
14 s/Debra R. Torres-Reyes  
Debra R. Torres-Reyes  
15 Attorney for Ivan Flores  
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